No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

I. L. PRICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Citations

INDEX—Continued

Statutes:

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 20, 1958.

CITATION TO OPINION BELOW

The District Court, in granting petitioner's motion for summary judgment (R. 94, 95),[1] issued no opinion. The opinion of the Court of Appeals, printed as Appendix B hereto (*infra*, p. 4a), is reported at 255 F. 2d 663.

1 Record references are to the printed record.

JURISDICTION

The judgment of the Court of Appeals, printed as Appendix C hereto (*infra*, p. 12a), was entered on May 20, 1958 (Tr. 110). Petition for Rehearing was denied on July 7, 1958 (Tr. 111). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) providing for review of cases in the courts of appeals by writ of certiorari.

QUESTIONS PRESENTED

1. After a discharged employe of a railroad has voluntarily elected to present the dispute over his discharge, seeking reinstatement and back pay, to the National Railroad Adjustment Board, under the provisions of Section 3, First (i), of the Railway Labor Act, and after that Board has made its Award denying his claim and he does not challenge the validity of the Award on any statutory or constitutional basis, may he then institute an independent action for wrongful discharge in a United States District Court, or is he bound by his election?

2. In the situation described in Question 1, does a District Court have jurisdiction to review the grounds relied upon by the Board in making a denial award and, on the basis of such review, nullify or disregard the express intention of Congress, as set forth in Section 3, First (m) of the Act, that Board awards shall be "final and binding upon both parties"?

STATUTE INVOLVED

The statute involved is the Railway Labor Act, 45 U. S. C. Section 153, the pertinent portions of which are set forth in Appendix D to this petition (*infra*, p. 13a).

STATEMENT OF THE CASE

The respondent L. L. Price was formerly employed by petitioner Union Pacific Railroad Company as a brakeman at Las Vegas, Nevada. On July 12, 1949, he reported for duty at 9:15 p. m. and was instructed to deadhead on a train from Las Vegas to Nipton, California. He arrived at Nipton at about 10:25 p. m. and was then instructed to stay at that point and to perform brakeman service on a train due in about six hours (R. 17, 18, 20). Price protested that there were no eating and sleeping facilities at Nipton, but he was again instructed to stay there. Price refused to follow such instructions and returned to Las Vegas (R. 18, 24, 25, 27, 28).

On July 16, 1949, Union Pacific charged Price with violating its operating rules and gave him written notice that he was to appear for an investigation and hearing on such charges, the investigation to be conducted in accordance with the provisions of the applicable collective bargaining agreement between Union Pacific and the Brotherhood of Railroad Trainmen governing the wages and working conditions of brakemen (R. 13).

Although it had been twice postponed at his request, Price did not appear at the investigation and it was finally held in his absence (R. 12, 17). A record of the investigation was transcribed (R. 12-29). On July 24, 1949, Union Pacific notified Price of his discharge (R. 3, 7).

Price requested and authorized the Brotherhood to handle his grievance and to seek his reinstatement with pay for all time lost and all other rights restored (R. 51). This matter was handled in the usual manner between Union Pacific and the Brotherhood, but no adjustment

was reached (R. 29-38). On January 11, 1951, Price, through the Brotherhood, elected to refer such dispute, including his claim for reinstatement with back pay and restoration of all other employment rights, to the First Division of the National Railroad Adjustment Board (R. 5, 60), in accordance with provisions of Section 3, First (i) of the Railway Labor Act.

In support of his claim of wrongful discharge, Price relied upon two main grounds, first, that his refusal to follow his instructions was justified and hence it was not insubordination; and, second, that the provisions of the collective bargaining agreement were not complied with in that the investigation was held in his absence (R. 8, 9). Oral hearing before the Board was waived (R. 12, 57).

On June 25, 1952, the Board made an award denying Price's claim seeking reinstatement and back pay based on alleged wrongful discharge (R. 59). National Railroad Adjustment Board, First Division Award 15509. The Board's decision is printed at Appendix A hereto (*infra*, p. 1a) and consisted of three parts, the Statement of the Claim, the Findings and the Award.

The Board's Findings consisted of certain jurisdictional statements followed by a brief statement of the dispute and some of the reasons relied upon by it in making its Award. In the Findings the Board first considered Price's failure to follow instructions, stating that Price "was found to have willfully disobeyed his orders." Following which, it held "This was insubordination and merited discipline." (R. 57, *infra*, p. 1a). The Board then held that the Agreement had not been violated.

with respect to the manner of holding the investigation (R. 57-59, *infra*, p. 3a). The Findings did not contain any discussion of other points advanced by Price in support of his claim.

The Board's Award, itself, consisted of but two words "Claim denied" (R. 59, *infra*, p. 3a).

On June 6, 1953, Price filed his complaint in the United States District Court for the District of Nevada. Jurisdiction was invoked because of diversity of citizenship, plaintiff Price being a citizen of Nevada and the defendant a Utah corporation. Price alleged that his dismissal was in violation of the Agreement between the Brotherhood and Union Pacific and that he had been discharged without just cause. Damages in the amount of $118,517.00 were sought (R. 3-5).

In its answer, Union Pacific denied that Price had been wrongfully discharged and alleged that the Board's Award, denying Price's entire claim, was a "final and binding" determination of the dispute under Section 3, First (m) of the Act, and that his election to pursue the remedy provided by that Act constituted a bar to his complaint (R. 68-72). Union Pacific moved for a summary judgment (R. 87), which was granted on May 24, 1957 (R. 94-95).

The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663; Appendix B, *infra*, p. 4a. In its opinion, that Court recognized and found that the Board had "issued an award denying Price's claim in its entirety" (Appendix B, *infra*, p. 6a). Nevertheless,

the Court reviewed the record before the Board and found that the submission of Price's dispute tendered two questions for determination, first, whether, under the circumstances, Union Pacific was entitled to discharge Price because of his failure to follow instructions, and, second, whether Price had been accorded the hearing provided for in the collective bargaining agreement. The Court decided that the first point constituted the "merits" of the dispute submitted to the Board (Appendix B, *infra*, p. 8a).

The Court then proceeded to review the Board's Findings and to determine the "grounds relied upon" in making such award. It held that, while the Board had determined the applicable agreement provisions had not been violated, the Board "misconstrued" Price's submission and had not considered or determined the other question presented; that it did not appear that the Board made any determination on the "merits" of Price's complaint. It said the Board "neither found nor concluded that the railroad was entitled to discharge Price." (Appendix B, *infra*, p. 9a). The Court held that because the Board had not passed on what the Court determined to be the merits of the dispute, the Award was not "final and binding" and the District Court had jurisdiction to entertain Price's action for damages.

Respondent Price did not challenge the validity of the Board's Award on any constitutional or statutory basis. His collateral attack on the Award, adopted by the Court below as the basis for its decision, was simply that the Board's Findings failed to explicitly state that under the facts Union Pacific was entitled to discharge him because of his failure to follow instructions.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. ELECTION OF REMEDIES.

The decision of the Court of Appeals for the Ninth Circuit in this case is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit in *Majors v. Thompson*, 235 F. 2d 449 (C. A. 5), and *Wooley v. Eastern Air Lines*, 250 F. 2d 86 (C. A. 5), certiorari denied, 356 U. S. 931. This conflict involves the effect of a discharged railroad employe's election to pursue his administrative remedy under Section 3, First (i), of the Railway Labor Act and whether by reason of such election, he is barred from seeking damages in an action at law for wrongful discharge. The Court below failed to perceive that Price's election to pursue his administrative remedy, by and of itself, barred any subsequent attempt to follow the other remedy irrespective of the ultimate disposition of the dispute by the Board.[2]

Majors held that an employe's action in voluntarily submitting his dispute to the Board in which he sought reinstatement constituted an election of "inconsistent and mutually exclusive" remedies and that such election operated to bar his right to subsequently litigate in the courts a claim for damages. The Court said:

> "* * * Where the employee has voluntarily applied to the Board for reinstatement an election of remedies has been made which bars the right to litigate before the courts a claim of damages for wrongful discharge. * * *" (235 F. 2d 449, 451-2)

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2 The Court of Appeals for the Ninth Circuit in a prior case correctly held that a discharged employe "having elected" to follow the administrative procedure of the collective bargaining agreement "debarred" a subsequent court action in spite of the fact that the employe abandoned pursuit of such remedy. *Peoples v. Southern Pacific*, 232 F. 2d 707, (C.A. 9), affirming 139 F. Supp. 783. *Breeland v. Southern Pacific*, (C.A. 9), 231 F. 2d 576. *Barker v. Southern Pacific*, 214 F. 2d 918; (C.A. 9).

The Court of Appeals for the Fifth Circuit did not inquire into or review the nature of the Board's decision or the "grounds relied upon" by the Board; the election of the administrative remedy by submitting the dispute to the Board was held to have barred the Court action.

In the *Wooley* case, the Court of Appeals for the Fifth Circuit also rejected an attempted attack on a Board award[3] on the basis of election of remedies, holding that the employe could not go to court after he had elected to go to the Board.

It has long been recognized that an election to pursue one of two inconsistent remedies precludes resort to the other without regard to the result of such pursuit. This Court, in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 301, held that the nature of the final disposition was of no consequence in applying the doctrine of election of remedies:

> "* * * But the election was determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court."

Accord: *Robb v. Vos*, 155 U. S. 13, 43; *Baltimore and O. R. Co. v. Brady*, 288 U. S. 448, 457; *Pennsylvania R. Co. v. Clark Coal Co.*, 238 U. S. 456, 470; and *Minnesota Nat. Bank v. Liberty National Bank*, 72 F. 2d 434, 436 (C. C. A. 10).

This Court's decisions in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, and *Slocum v. Delaware & L. & W.*

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3 The *Wooley* case involved a denial award of an Airline System Board of Adjustment established by agreement under Section 204, Title II, of the Railway Labor Act.

R. Co., 339 U. S. 239, 244, made clear the election available to the discharged railroad employe. If he still considers himself an employe and asserts his right to be retained as such, he must go to the Board. If he accepts the discharge as final, he may sue in court for breach of contract. But he may not do both. He may proceed "*either* in accordance with the administrative procedures prescribed in his employment contract *or* he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim." *T. W. A. v. Koppal*, 345 U. S. 653, 661 (Emphasis supplied). The Court also emphasized that the Act "provides a procedure for handling grievances so as to avoid litigation and interruptions of service * * *." (page 660).

2. FINALITY OF BOARD'S AWARD.

The Award of the Board in this matter was simply "Claim denied." (R. 59, *infra*, p. 3a). This is the "award" which Section 3, First (m) of the Railway Labor Act provides "shall be final and binding upon both parties to the dispute." The Court below failed to apply this unambiguous provision to Award 15509 disposing of Price's dispute with Union Pacific over his alleged wrongful discharge.

In this regard, there is a direct conflict between the decision below and the decisions of the Courts of Appeals for the Tenth, Second and Third Circuits in *Reynolds v. Denver & R. G. W. R. Co.*, 174 F. 2d 673 (C. A. 10); *Weaver v. Pennsylvania R. Co.*, 240 F. 2d 350 (C.A. 2), affirming *per curiam*, 141 F. Supp. 214 (S.D., N.Y.); and *Bower v. Eastern Airlines*, 214 F. 2d 623 (C.A. 3), certiorari denied 348 U. S. 871, respectively.

The Court of Appeals for the Tenth Circuit in the *Reynolds* case held the "final and binding" provision of Section 3, First (m) deprived the District Court of jurisdiction in an employe's action for damages brought subsequent to the rendition of an award by the Board.[4] The Act's language was held to be "clear and susceptible only of one construction, namely, that in cases other than where a money award is made the judgment [award] of the Board is final and binding upon the parties thereto." 174 F. 2d 673 at 675 (interpolation). In view of which that Court held the award "may not be challenged."

In *Weaver v. Pennsylvania R. Co.*, 240 F. 2d 350, the Court of Appeals for the Second Circuit affirmed a summary judgment for the railroad, adopting the opinion of the District Court, 141 F. Supp. 214. That Court held that a denial award of a System Board of Adjustment[4] in a discharge case was "conclusive upon an employee provided the applicable statutory and jurisdictional processes have been observed." (page 219)

The Court of Appeals for the Third Circuit in the *Bower* case, 214 F. 2d 623, held a discharged airline employe barred from bringing an action at law for damages after an Airline System Board of Adjustment had upheld the validity of his discharge, because of the "final and binding" provision of the agreement establishing the Board under Section 204, Title II, of the Railway Labor Act. The Court said:

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4 The System Board of Adjustment was established under Section 3, Second, of the Act by an agreement between the railroad and the labor organization, plaintiff's collective bargaining representative. It provided, as in Section 3, First (m), of the Act, that the awards of the Board would be "final and binding on all parties to the dispute."

"Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case." (214 F. 2d 623 at page 626)

In the instant case, instead of holding the Board's Award "final and binding", as required under Section 3, First (m), the Court below proceeded to review not only the Board's Findings, but the record of the submissions before the Board as well. (Appendix B, footnote 5, *infra*, p. 9a.) Notwithstanding its acknowledgment that the Board's Award was an "outright denial of the claim", the Court below, after its review, determined that the Board had "misconstrued" Price's submission and that the Board had failed to discuss, and pass upon, what the Court determined to be the "merits" of Price's dispute. On the basis of the foregoing rationale, the Court below held that the Award was not "final and binding."

The only requirement in the Act as to awards is that they shall be in writing and copies furnished the parties. Section 3, First (m). Nowhere in the Act is there any requirement that the Board must make a specific finding upon every point advanced in a dispute[5]; in fact, the Act does not require that findings be made. Findings are only mentioned in Section First (p), which pro-

5 In *Ramsey v. Chesapeake & O. R. Co.*, 75 F. Supp. 740, 742, (N.D. Ohio), the court noted that the Board had failed to make specific findings upon all of the facts and issues submitted to it, but, nevertheless, held the denial award final and binding, precluding any court review.

vides that in an enforcement action brought on a sustaining money award, the findings of the Board shall be "prima facie evidence of the facts therein stated." But this is no requirement that there be findings in every decision or that they specifically cover every question involved in the dispute. It was the ultimate disposition of the dispute, the award itself, which the Act made "final and binding."

Moreover, the decision of the Court below conflicts in principle with applicable decisions of this Court. In *Elgin, J. and E. R. Co. v. Burley,* 325 U. S. 711, 721, the decision involved whether a collective bargaining representative, absent other authority, had unilateral authority under the Act to compromise and settle accrued monetary claims of employes. There was also involved in that case the contention that in any event an award by the Board was not a final award but was merely advisory. This Court "put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history." Except where the Act provides for judicial review, the Act "purports to make the Board's decisions 'final and binding' ". (page 727)

More recently, in *Railroad Trainmen v. Chicago River and Indiana R. Co.,* 353 U. S. 30, 34, this Court again commented upon the "unequivocal" language of Section 3, First (m), in providing that the awards of the "Board are final and binding upon both parties." There appears little doubt but that the "final and binding" provision of the Act was essential to this Court's decision holding unlawful a strike over "minor disputes" or grievances pending before the Board.

3. THE COURT MISUNDERSTOOD THE NATURE AND MEANING OF THE BOARD'S DECISION.

The Court below misunderstood and misconceived the entire import of the Board's Findings and Award in determining that the Board had failed to pass upon the "merits" of Price's dispute with Union Pacific. Based on such misconception, the Court below decided the Award was not "final and binding." The Board, in its Findings, held that Price's failure to follow orders was "insubordination and merited discipline." (R. 57, *infra*, p. 1a). Petitioner submits that the Board could not have made this finding except after considering and rejecting the "merits" of Price's attempted justification for his admitted failure to obey orders.

After disposing of the so-called merit issue, the only remaining question for the Board's review was whether the alleged procedural defect was sufficient for the Board to disturb the discipline on the grounds that the investigation was conducted in Price's absence. The Court's misconception of the Board's decision stems from its attempt to determine what the Board "believed" from a statement made in the Findings after the Board had rejected Price's attempted justification for his failure to follow orders that, "Thus, the only question for review * * *" (R. 57, *infra*, p. 2a). Because of this statement, the Court concluded that this showed a "misconstruction" of Price's submission to the Board and that the Board had not passed upon the merit issue. It is submitted that this phrase was simply prefatory to the discussion of the alleged procedural defect in the holding of the investigation and does not indicate any failure on the Board's part to consider and pass upon Price's contention that his insubordination was justified. It is

a statement that having found Price's insubordination not justified, the only question left for review by the Board was the alleged agreement violation in the conduct of the hearing.

The misunderstanding of the Court below in its review and interpretation of the Board's Findings has been discussed because it shows the confusion which can and undoubtedly will result if a District Court has the jurisdiction to review "the grounds relied upon" by the Board in making a denial award. The inclusion of the "final and binding" provision in Section 3, First (m) of the Act compels the conclusion that it was just this sort of review which Congress sought to avoid.

The critical reading and review which the Court below has given the Board's Findings indicates a failure to appreciate that "The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike." *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 241 (C. A., D. C.), affirmed 319 U. S. 732.

Judge Goodrich, in *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793, 795, 796 (C. A. 3), discussed the nature of the Board's Findings in an action to enforce a Board award under Section 3, First (p). He pointed out that they are "a long way from being the neat, definite and precise findings of fact and conclusions of law from the pen of an experienced and conscientious trial judge * * *." But he recognized that it would be "doctrinaire and unreal-

istic" to insist on precise findings of fact.[6] *Virginian R. Co. v. System Federation No. 40*, 131 F. 2d 840, 844-45 (C. C. A. 4).

4. THE DECISION BELOW WILL CREATE DISPUTES AND LITIGATION.

The instant case raises important and novel problems arising under the Railway Labor Act and merits review by this Court. On two occasions, the Court has left open the questions presented here. *Elgin, Joliet & E. R. Co. v. Burley*, 325 U. S. 711, 720, and *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, footnote 7 at 244. See, also, *Washington Terminal v. Boswell*, 124 F. 2d 235, 245, affirmed 319 U. S. 732.

By the decision below, United States District Courts are empowered to inquire into and review the "grounds relied upon" by the Board in making an award and, based on such review, decide whether an award is to be final and binding on the parties. To allow such an inquiry will effectively nullify the finality provisions of the Act. We submit that such an inquiry is contrary to the provisions of the Act and the intent of Congress. The Board was created to bring the "settlement of grievances * * * within a general and inclusive plan of *decision*." *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 728 (Emphasis supplied).

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6 Judge Goodrich, again speaking for the Third Circuit, had no difficulty in applying the election of remedies doctrine as well as the finality provision of the Act to a similar award (National Railroad Adjustment Board, First Division Award 16427) where the Board had not passed on the merits of the employe's claim, but had dismissed it on the basis of its Finding that the "dispute was settled on the property by and between the parties to the controlling agreement * * *." *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579, 580 (C.A. 3).

The decision below will require a showing in every Board decision denying a claim involving discharge that the Board has considered and passed upon every question presented or contention advanced in support of a claim. Without such, Board awards will be subject to challenge and will not be accorded the "final and binding" effect provided in the Act. This requirement is foreign to the Railway Labor Act.

The failure of the Court below to accord "final and binding" effect to the Award of the Board subjects the railroads, in such cases, to a dual liability under mutually inconsistent remedies. It affords discharged employes an uneven advantage never contemplated. In this case, respondent is given another opportunity after an unsuccessful try at the Adjustment Board and the petitioner will be forced to relitigate a wrongful discharge dispute which is now nine years old.

The decision of the Court below abrogates petitioner's rights under the Railway Labor Act affording either party before the Board the right of Board decision and its "final and binding" effect. That right is a nullity under the decision below.[7]

Nor is the decision below confined in its effect to the instant case. In the railroad industry, almost all collective bargaining agreements covering all classes of employes contain provisions prescribing certain time limita-

7 "* * * If a carrier can have full advantage of the administrative proceeding, on the chance it will be successful, yet when the event is otherwise relieve itself of all its disadvantages, circumventing the employee's rights by judicial proceedings in which they are not available, the Railway Labor Act will have become, finally, a dead letter. * * *". *Washington Terminal Co. v. Boswell.* 124 F. 2d 235, 242.

tions which must be followed in the progression and handling of disputes, including discharge cases, both in the handling on the railroad property and before the Board as well.[8] Many cases involving discharges are progressed to the Board which have not been handled in accordance with the prescribed time limits. Generally, these are denied or dismissed by the Board solely for that reason. In such cases, the Board properly gives no consideration to the merits of the discharge.[9] The decision below opens the door to the employes in those cases and will permit them to bring a court action for damages for wrongful discharge.

One of the 21 grievances before the Board in the *Chicago River* case involved the discharge of an employe. 353 U. S. 30, 32. The railroad's defense thereto was that the grievance was barred by reason of the time limit provisions of the collective bargaining agreement. Subsequent to this Court's decision, the Board made an award denying the employe's right to reinstatement solely because of a failure to comply with the time limit provisions of the controlling agreement. The Board did not consider or pass upon the merits of his discharge. National Railroad Adjustment Board, First Division Award 18214. Under the holding below, that award would not be "final and binding" on the employe under Section 3, First (m) of the Act, and yet it was this finality provision which was at the basis of the Court's decision in the *Chicago River* case barring a strike over the same grievance.

Additionally, there are many instances[10] where the

8 See, for example, National Railroad Adjustment Board, First Division Awards 17439, 17611 and 18056.

9 See awards cited in footnote 8.

10 See, for example, National Railroad Adjustment Board, First Division Awards 16833, 16835, 16841 and 16871.

Board has denied or dismissed disputes involving the discharge of employes because they were not handled on the railroad property in accordance with the provisions of Section 3, First, (i), of the Act. In none of these cases does the Board consider the merits of the discharge. Here, too, the decision below may afford such employes the right to proceed against the railroad in a court action.

The Court below, while purporting to avoid any review of the Board's decision, nevertheless, did review and interpret the Board's Findings as well as Price's submissions to the Board, all in an effort to determine the nature of the questions presented and whether the Board gave proper consideration thereto in making its denial award. It is clear that the Act never intended such court review of what the Court below has described as an "unambiguous award". The Act was designed to settle disputes, not to create or prolong them, but that is the result.

Because the decision below has created important and unwarranted exceptions to the basic principles embodied in the Act and in this Court's opinions, and is in direct conflict with decisions of other courts of appeals, review by this Court is essential.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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